

January 20, 2006

The Justices
Supreme Judicial Court
John Adams Courthouse
One Pemberton Square
Boston, MA 02108

Dear Justices,

In Commonwealth v. Pelosi, 441 Mass. 257 (2004) , the Supreme Judicial Court "announce[d] the formation of a committee that will study and present to the court alternatives to the current protocol regarding defense access to privileged records in sexual assault cases." Id. at 258 n.1. In March 2004, the Court appointed Associate Justice Martha B. Sosman as chair, and thirteen members to serve on this group, to be called the Supreme Judicial Court Committee to study the Bishop/Fuller protocol. (See Tab 1 for a list of Committee members.) The Court's charge to the Committee was stated in our letters of appointment:

In an effort to strike the proper balance between defendants' constitutional rights to examine and present all evidence relevant to their defense and society's interests, expressed in statutory privileges, in protecting confidential relationships, we are seeking recommendations as to whether the current protocol should be retained in its present form, or revised in whole or in part.

The Committee met twelve times between April 2004 and January 2006¹. However, despite our best efforts, and agreement on certain fundamental principles, the Committee was unable to reach a consensus on how best to reconcile the divergent interests implicated when a defendant seeks access to privileged records of a victim-witness. Basically, and not surprisingly, members generally expressed two incompatible views : (1) a belief that victims have a right of privacy reflected in privileges created by the Legislature to advance strong public policies; that if that right is to be abrogated at all, a judge should review confidential or privileged records to determine relevancy under the Bishop-Fuller standard; and that permitting defendants or defense

¹ The Attached Report of the Supreme Judicial Court Committee to Study the Bishop/Fuller Protocol describes the work schedule and work product of the Committee.

attorneys to conduct the record review would constitute a re-victimization of the victim; vs. (2) a belief that a defendant's right to a fair trial requires his attorney to review records claimed to be privileged, as trial judges are ill positioned to conduct the required review of what are often complex and voluminous records; and that privacy concerns of the complainant can be addressed by both the initial relevancy determination of *Lampron* and protective orders together with the professionalism and ethical responsibilities of the attorneys involved.

In the summer of 2005, the Committee decided to present three proposed alternative approaches or protocols to the Court. One member volunteered to be the primary drafter of each protocol. (See Tabs 2-4 for the three proposed alternative protocols.)

In the fall of 2005, Committee members observed that, because the drafters sought to achieve consensus wherever possible, the three alternative protocols contained significant similarities.² A member volunteered to draft a consolidated document that would indicate areas of agreement and disagreement. By January, 2006, however, it was clear that the Committee would not be able to iron out areas of disagreement with the draft consolidated protocol in a timely fashion. Some members also believed that a consolidated document would not adequately reflect the significant divergence of views among the three alternative approaches.

Given the passage of time and the Court's grant of direct appellate review in the case of Commonwealth v. Dwyer (SJC-09563), in which the defendant asks the Court to reconsider "the constitutionality – and questionable continued vitality of this Court's modification of the protocol established in Commonwealth v Bishop, 416 Mass. 169 (1993), under the subsequent decision in Commonwealth v. Fuller, 423 Mass. 216 (1996),"³ the Committee believes that little would be accomplished by striving further to refine the three proposed alternative protocols or the proposed consolidated protocol. The Committee also recognizes that some members intend to file amicus briefs in Commonwealth v. Dwyer, which may well differ from the proposals that are appended to this Report.

² In very abbreviated fashion: Proposed protocols A and B essentially retain the Bishop-Fuller procedure but streamline it to fit within the newly revised Mass. R. Crim. P. 14 and Superior Court Standing Order 2-86. (Proposed protocol B also provides for a judicial determination of relevancy at a "record review hearing.") Proposed protocol C is Stockhammer-based because it does not require a judge to inspect third-party records to make a determination of relevancy.

³ Defendant's Request for Direct Appellate Review at 1-2, Commonwealth v. Dwyer (DAR-14785).

January 20, 2006

In one sense, we are disappointed that we could not achieve a consensus. However, we have come to recognize that, given the Committee members' divergent roles and views, the question presented raises issues not amenable to decision by consensus. We therefore present three clear alternatives to the Court for its consideration. We remain committed to the process and will, if called upon, re-group to formulate any protocol suggested by the decision of the Court.

Sincerely,

R. Marc Kantrowitz